ARTICLE 8

South Carolina Uniform Power of Attorney Act

Part 1

General Provisions

Code Commissioner’s Note

Part title added at the direction of the Code Commissioner, in 2016.

**SECTION 62‑8‑101.** Short title.

 This article may be cited as the “South Carolina Uniform Power of Attorney Act”.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This article incorporates much of the Uniform Power of Attorney Act and retains some of the prior provisions of the South Carolina Code Sections 62‑5‑501 through 62‑5‑503, including the recording of a durable power of attorney. It does not, however, incorporate the option for a statutory power of attorney found in the Act.

The concept of a “power of attorney” was first incorporated into the Uniform Probate Code in 1969 to offer an inexpensive method of surrogate decision making to those whose modest assets did not justify pre‑incapacity planning with a trust or post‑incapacity property management with a guardianship. After more than three decades, the durable power of attorney is now used by both the wealthy and the non‑wealthy for incapacity planning as well as convenience. The Uniform Power of Attorney Act (2006) (UPOAA) is necessary because over the years many states adopted non‑uniform provisions to deal with issues on which the Uniform Probate Code and the original Uniform Durable Power of Attorney Act are silent. The UPOAA, which provides uniformity on these issues, enhances the usefulness of durable powers while protecting the principal, the agent, and those who deal with the agent.

A national study of durable powers of attorney, conducted in 2002, revealed the need to address numerous issues not contemplated in the original Uniform Durable Power of Attorney Act such as the authority of multiple agents, the authority of later‑appointed guardians, and the impact of dissolution or annulment of the principal’s marriage to the agent. The study also revealed other topics about which the states had legislated, although not necessarily in a divergent manner, including: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on powers that alter a principal’s estate plan. In a national survey, trust and estate lawyers’ responses demonstrated a high degree of consensus about the need to improve portability and acceptance of powers of attorneys as well as the need to better protect incapacitated principals.

The UPOAA, which supersedes the Uniform Durable Power of Attorney Act, the Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code, consists of four articles. South Carolina’s version of the Act is generally based on three of the articles, which are included in the South Carolina Act as parts of Article 8 of Title 62. Although the South Carolina version generally follows the UPOAA, some provisions are different.

The first article of the UPOAA contains all of the general provisions that pertain to creation and use of a power of attorney. While most of these provisions are default rules that can be altered by the power of attorney, certain mandatory provisions in Article 1 serve as safeguards for the protection of the principal, the agent, and persons who are asked to rely on the agent’s authority. Article 2 of the UPOAA provides default definitions for the various areas of authority that can be granted to an agent. The genesis for most of these definitions is the Uniform Statutory Form Power of Attorney Act (1988); however, the language is updated where necessary to reflect modern day transactions. Article 2 also identifies certain areas of authority that must be granted with express language because of the propensity of such authority to dissipate the principal’s property or alter the principal’s estate plan. Article 3 of the UPOAA contains an optional statutory form that is designed for use by lawyers as well as lay persons. Step‑by‑step prompts are given for designation of the agent, successor agents, and the grant of authority. The South Carolina version of the Act does not adopt an optional statutory form and reserves Part 3 of Article 8 of Title 62 for possible later use. Article 3 of the UPOAA also contains a sample agent certification form. The South Carolina version provides a sample certification form at Section 62‑8‑119(f). Article 4 of the UPOAA contains miscellaneous provisions concerning the relationship of the Act to other law and pre‑existing powers of attorney.

The UPOAA seeks to preserve the durable power of attorney as a low‑cost, flexible, and private form of surrogate decision making while deterring use of the power of attorney as a tool for financial abuse of incapacitated individuals. It contains provisions that encourage acceptance of powers of attorney by third persons, safeguard incapacitated principals, and provide clearer guidelines for agents.

The UPOAA provides broad protection for good faith acceptance or refusal of an acknowledged power of attorney, consequences for unreasonable refusal of an acknowledged power of attorney, and recognition of the portability of powers of attorney validly created under other law. The UPOAA seeks to address the problem of arbitrary refusals of powers of attorney by entities such as banks, brokerage houses, and insurance companies.

Protections for the principal under the UPOAA are multi‑faceted and include: mandatory as well as default fiduciary duties for the agent; liability for agent misconduct; broad standing provisions for judicial review of the agent’s conduct; and the requirement of express language to grant certain authority that could dissipate the principal’s property or alter the principal’s estate plan. Mandatory duties include acting in good faith, within the scope of the authority granted and according to the principal’s reasonable expectations (or, if unknown, the principal’s best interest). Default duties that can be varied in the power of attorney include the duty to preserve the principal’s estate plan (subject to certain qualifications) and the duty to cooperate with the person who has the principal’s health‑care decision making authority.

The UPOAA recognizes that many agents are family members who have inherent conflicts of interest, but that these conflicts may not, in and of themselves, prevent an agent from acting competently for the principal’s benefit. While it is well‑accepted that an agent under a power of attorney is a fiduciary, most state statutes do not specify what that means. The UPOAA addresses this dilemma in a default provision which recognizes that an agent who acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has conflicting interests. Furthermore, the Uniform Act permits the principal to include in the power of attorney an exoneration clause for the benefit of the agent. Another provision that operates to the benefit of both the principal and the agent is one requiring notice of an agent’s resignation. If the agent cannot effectively notify the principal because the principal is incapacitated, the provision gives a hierarchy of persons to whom the agent may give notice, including a governmental agency having authority to protect the welfare of the principal.

In the final analysis, there may be no perfect solution to meet the surrogate decision making needs of our aging society, but the UPOAA balances the competing interests at stake with legislative reforms that enhance the usefulness of durable powers while at the same time protecting the principal, the agent, and those who deal with the agent.

**SECTION 62‑8‑102.** Definitions.

 For purposes of this article:

 (1) “Agent” means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney‑in‑fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to whom an agent’s authority is delegated. An agent is a fiduciary.

 (2) “Durable,” with respect to a power of attorney, means not terminated by the principal’s incapacity.

 (3) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

 (4) “Good faith” means honesty in fact.

 (5) “Incapacity” means inability of an individual to manage property or business affairs because the individual:

 (A) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or

 (B) is:

 (i) missing;

 (ii) detained, including incarcerated in a penal system; or

 (iii) outside the United States and unable to return.

 (6) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited‑liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or another legal or commercial entity.

 (7) “Power of attorney” means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term “power of attorney” is used.

 (8) “Presently exercisable general power of appointment”, with respect to property or a property interest subject to a power of appointment, means power exercisable at the time in question to vest absolute ownership in the principal individually, the principal’s estate, the principal’s creditors, or the creditors of the principal’s estate. The term includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period. The term does not include a power exercisable in a fiduciary capacity or only by will.

 (9) “Principal” means an individual with contractual capacity who grants authority to an agent in a power of attorney.

 (10) “Property” means anything that may be the subject of ownership, whether real or personal, or legal or equitable, or any interest or right in the property.

 (11) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

 (12) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or a territory or insular possession subject to the jurisdiction of the United States.

 (13) “Stocks and bonds” means stocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held directly, indirectly, or in another manner. The term does not include commodity futures contracts and call or put options on stocks or stock indexes.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

Although most of the definitions in Section 62‑8‑102 are self‑explanatory, a few of the terms warrant further comment.

“Agent” replaces the term “attorney in fact” used in prior Sections 62‑5‑501 through 62‑5‑503, which this Act replaces. This change was made to avoid confusion about the meaning of the term and the difference between an attorney in fact and an attorney at law.

“Incapacity” replaces the term “disability” used in the replaced sections in recognition that disability does not necessarily render an individual incapable of property and business management. The definition of incapacity stresses the operative consequences of the individual’s impairment‑inability to manage property and business affairs‑rather than the impairment itself. The definition of incapacity in the Act is also consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act as amended in 1997.

The definition of “power of attorney” clarifies that the term applies to any grant of authority in a writing or other record from a principal to an agent which appears from the grant to be a power of attorney, without regard to whether the words “power of attorney” are actually used in the grant.

“Presently exercisable general power of appointment” is defined to clarify that where the phrase appears in the Act it does not include a power exercisable by the principal in a fiduciary capacity or exercisable only by will. Cf. Restatement (Third) of Property (Wills and Don. Trans.) Section 19.8 cmt. d (Tentative Draft No. 5, approved 2006) (noting that unless the donor of a presently exercisable power of attorney has manifested a contrary intent, it is assumed that the donor intends that the donee’s agent be permitted to exercise the power for the benefit of the donee). Including in a power of attorney the authority to exercise a presently exercisable general power of appointment held by the principal is consistent with the objective of giving an agent comprehensive management authority over the principal’s property and financial affairs. The term appears in Section 62‑8‑211 (Estates, Trusts, and Other Beneficial Interests) in the context of authority to exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal (see Section 62‑8‑211(b)(3)), and in Section 62‑8‑217 (Gifts) in the context of authority to exercise for the benefit of someone else a presently exercisable general power of appointment held by the principal (see Section 62‑8‑217(b)(1)). If a principal wishes to delegate authority to exercise a power that the principal holds in a fiduciary capacity, Section 62‑8‑201(a)(7) requires that the power of attorney contain an express grant of such authority. Furthermore, delegation of a power held in a fiduciary capacity is possible only if the principal has authority to delegate the power, and the agent’s authority is necessarily limited by whatever terms govern the principal’s ability to exercise the power.

“Principal” is defined to incorporate South Carolina’s requirement that the person executing the power of attorney or a revocation of a power of attorney must have contractual capacity. See In re Thames, 344 S.C. 564, 544 S.E. 2d 854 (Ct. App. 2001); see also, Gaddy v. Douglass, 359 S.C. 329, 597 S.E.2d 12 (Ct. App. 2004).

CROSS REFERENCES

When power of attorney effective, see Section 62‑8‑109.

**SECTION 62‑8‑103.** Applicability.

 This article applies to all powers of attorney except a:

 (1) power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction;

 (2) proxy or other delegation to exercise voting rights or management rights with respect to an entity;

 (3) power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose;

 (4) power created on a form provided by a financial institution or brokerage firm that relates to the account at the financial institution or brokerage firm and is intended for use solely by the financial institution or brokerage firm.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

The South Carolina Uniform Power of Attorney Act is intended to be comprehensive with respect to delegation of surrogate decision making authority over an individual’s property and property interests, whether for the purpose of incapacity planning or mere convenience. Given that an agent will likely exercise authority at times when the principal cannot monitor the agent’s conduct, the Act specifies minimum agent duties and protections for the principal’s benefit. These provisions, however, may not be appropriate for all delegations of authority that might otherwise be included within the definition of a power of attorney. This section lists delegations of authority that are excluded from the Act because the subject matter of the delegation, the objective of the delegation, the agent’s role with respect to the delegation, or a combination of the foregoing, would make application of the Act’s provisions inappropriate.

Subsection (a)(1) excludes a power to the extent that it is coupled with an interest in the subject of the power. This exclusion addresses situations where, due to the agent’s interest in the subject matter of the power, the agent is not intended to act as the principal’s fiduciary. See Restatement (Third) of Agency Section 3.12 (2006) and M.T. Brunner, Annotation, What Constitutes Power Coupled with Interest within Rule as to Termination of Agency, 28 A.L.R.2d 1243 (1953). Common examples of powers coupled with an interest include powers granted to a creditor to perfect or protect title in, or to sell, pledged collateral. While the example of “a power given to or for the benefit of a creditor in connection with a credit transaction” is highlighted in subsection (a)(1), it is not meant to exclude application of subsection (a)(1) to other contexts in which a power may be coupled with an interest, such as a power held by an insurer to settle or confess judgment on behalf of an insured. See, e.g., Hayes v. Gessner, 52 N.E.2d 968 (Mass. 1944).

Subsection (a)(2) excludes from the Act a proxy or other delegation to exercise voting rights or management rights with respect to an entity. The rules with respect to those rights are typically controlled by entity‑specific statutes within a jurisdiction. See, e.g., Model Bus. Corp. Act Section 7.22 (2002); Unif. Ltd. Partnership Act Section 118 (2001); and Unif. Ltd. Liability Co. Act Section 404(e) (1996). Notwithstanding the exclusion of such delegations from the operation of this Act, Section 62‑8‑209 contemplates that a power granted to an agent with respect to operation of an entity or business includes the authority to “exercise in person or by proxy . . . a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds . . .”(see paragraph (5) of Section 62‑8‑209). Thus, while a person that holds only a proxy pursuant to an entity voting statute will not be subject to the provisions of this Act, an agent that is granted Section 62‑8‑209 authority is subject to the Act because the principal has given the agent authority that is greater than that of a mere voting proxy. In fact, typical entity statutes contemplate that a principal’s agent or “attorney in fact” may appoint a proxy on behalf of the principal. See, e.g., Model Bus. Corp. Act Section 7.22 (2002); Unif. Ltd. Partnership Act Section 118 (2001); and Unif. Ltd. Liability Co. Act Section 404(e) (1996).

Subsection (a)(3) excludes from the Act any power created on a governmental form for a governmental purpose. Like the excluded powers in subsections (1) and (2), the authority for a power created on a governmental form emanates from other law and is generally for a limited purpose. Notwithstanding this exclusion, the Act specifically provides in paragraph (7) of Section 62‑8‑203 that a grant of authority to an agent includes, with respect to that subject matter, authority to “prepare, execute, and file a record, report, or other document to safeguard or promote the principal’s interest under a statute or governmental regulation.” Section 62‑8‑203, paragraph (8), further clarifies that the agent has the authority to “communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality, on behalf of the principal.” The intent of these provisions is to minimize the need for a special power on a governmental form with respect to any subject matter over which an agent is granted authority under the Act.

Subsection (a)(4) excludes from the Act any power created on a financial institution form for internal purposes. Like the excluded powers in subsections (1), (2), and (3), the authority for a power created on a financial institution form emanates from other law and is generally for a limited purpose. The intent of these provisions is to not interfere with the private business relationship which exists between the financial institution and the principal.

Sections 62‑5‑501 through 62‑5‑518 deal with health care powers of attorney and replace former Section 62‑5‑504, but the new sections merely renumber the former provisions and do not change the substance of former Section 62‑5‑504. Section 62‑5‑502, formerly Section 62‑5‑504(B), provides that “[s]statutory provisions that refer to a durable power of attorney or judicial interpretations of the law relating to durable powers of attorney apply to a health care power of attorney to the extent that they are not inconsistent with this Part” (Sections 62‑5‑501 through 62‑5‑518). The Act recognizes that matters of financial management and health‑care decision making are often interdependent. The Act consequently provides in Section 62‑8‑114(b)(5) a default rule that an agent under the Act must cooperate with the principal’s health‑care decision maker.

**SECTION 62‑8‑104.** Power of attorney is durable.

 A power of attorney created pursuant to this part after the effective date is durable unless it expressly provides that it is terminated by the incapacity of the principal.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

Section 62‑8‑104 establishes that a power of attorney created after the effective date of the Act is durable unless it expressly states otherwise. This default rule is the reverse of South Carolina’s previous approach and is based on the assumption that most principals prefer durability as a hedge against the need for conservatorship or guardianship. See also Section 62‑8‑107 Reporter’s Comment (noting that the default rules of the jurisdiction’s law under which a power of attorney is created, including the default rule for durability, govern the meaning and effect of a power of attorney).

**SECTION 62‑8‑105.** Execution of power of attorney.

 A power of attorney must be:

 (1) signed by the principal or in the principal’s presence by another individual directed by the principal to sign the principal’s name on the power of attorney;

 (2) attested with the same formality and with the same requirements as to witnesses as a will in South Carolina; and

 (3) acknowledged or proved pursuant to Section 30‑5‑30.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section retains the requirement that the principal’s act of signing the power of attorney must be witnessed in the same manner as a will in South Carolina and also either acknowledged by the principal in the presence of a notary or attested to by one of the witnesses in the presence of a notary and, under Section 62‑8‑102(9), the principal must have contractual capacity. As a practical matter, these requirements are also necessary to create a valid power of attorney that may be recorded as described in Section 62‑8‑109(c).

CROSS REFERENCES

Acceptance of and reliance upon acknowledged power of attorney, form, see Section 62‑8‑119.

Termination of power of attorney or agent’s authority, see Section 62‑8‑110.

Validity of power of attorney, see Section 62‑8‑106.

When power of attorney effective, see Section 62‑8‑109.

**SECTION 62‑8‑106.** Validity of power of attorney.

 (a) A power of attorney executed on or after the effective date of this article is valid if its execution complies with Section 62‑8‑105.

 (b) A power of attorney executed before the effective date of this article is valid if its execution complied with the law of this State as it existed at the time of execution.

 (c) A power of attorney executed other than in this State that is not otherwise valid under subsection (a) or (b) is valid in this State if, when the power of attorney was executed, the execution complied with the:

 (1) law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to Section 62‑8‑107; or

 (2) requirements for a military power of attorney pursuant to 10 U.S.C. Section 1044b, as amended.

 (d) Except as otherwise provided by statute other than this part, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

One of the purposes of the South Carolina Uniform Power of Attorney Act is promotion of the portability and use of powers of attorney. This section makes clear that the Act does not affect the validity of pre‑existing powers of attorney executed under prior law in South Carolina, powers of attorney validly created under the law of another jurisdiction, and military powers of attorney. While the effect of this section is to recognize the validity of powers of attorney created under other law, it does not abrogate the traditional grounds for contesting the validity of execution such as lack of contractual capacity, forgery, fraud, or undue influence.

This section also provides that unless otherwise required, a photocopy or electronically transmitted copy has the same effect as the original.

CROSS REFERENCES

Termination of power of attorney or agent’s authority, see Section 62‑8‑110.

When power of attorney effective, see Section 62‑8‑109.

**SECTION 62‑8‑107.** Meaning and effect of power of attorney.

 The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section recognizes that a foreign power of attorney, or one executed before the effective date of the South Carolina Uniform Power of Attorney Act, may have been created under different default rules than those in this Act. Section 62‑8‑107 provides that the meaning and effect of a power of attorney is to be determined by the law under which it was created. For example, the law in another jurisdiction may provide for different default rules with respect to durability of a power of attorney (see Section 62‑8‑104), the authority of coagents (see Section 62‑8‑111) or the scope of specific authority such as the authority to make gifts (see Section 62‑8‑217). Section 62‑8‑107 clarifies that the principal’s intended grant of authority will be neither enlarged nor narrowed by virtue of the agent using the power in a different jurisdiction. For a discussion of the issues that can arise with inter‑jurisdictional use of powers of attorney, see Linda S. Whitton, Crossing State Lines with Durable Powers, Prob. & Prop., Sept./Oct. 2003, at 28.

This section also establishes an objective means for determining what jurisdiction’s law the principal intended to govern the meaning and effect of a power of attorney. The phrase, “the law of the jurisdiction indicated in the power of attorney,” is intentionally broad, and includes any statement or reference in a power of attorney that indicates the principal’s choice of law. Examples of an indication of jurisdiction include a reference to the name of the jurisdiction in the title or body of the power of attorney, citation to the jurisdiction’s power of attorney statute, or an explicit statement that the power of attorney is created or executed under the laws of a particular jurisdiction. In the absence of an indication of jurisdiction in the power of attorney, Section 62‑8‑107 provides that the law of the jurisdiction in which the power of attorney was executed controls. The distinction between “the law of the jurisdiction indicated in the power of attorney” and “the law of the jurisdiction in which the power of attorney was executed” is an important one. The common practice of property ownership in more than one jurisdiction increases the likelihood that a principal may execute in one jurisdiction a power of attorney that was created and intended to be interpreted under the laws of another jurisdiction. A clear indication of the jurisdiction’s law that is intended to govern the meaning and effect of a power of attorney is therefore advisable in all powers of attorney.

CROSS REFERENCES

Termination of power of attorney or agent’s authority, see Section 62‑8‑110.

Validity of power of attorney, see Section 62‑8‑106.

**SECTION 62‑8‑108.** Nomination of conservator or guardian; relation of agent to court‑appointed fiduciary.

 (a) In a power of attorney, a principal may nominate a conservator or guardian for consideration by the court if protective proceedings for the principal’s estate or person are begun after the principal executes the power of attorney. Except for good cause shown or disqualification, the court shall make its appointment in accordance with the principal’s most recent nomination.

 (b) If, after a principal executes a power of attorney, a court appoints a conservator or guardian of the principal’s estate or other fiduciary charged with the management of some or all of the principal’s property, the agent is accountable to the fiduciary as well as to the principal. Unless the power of attorney provides otherwise, appointment of a guardian terminates all or part of the power of attorney that relates to matters within the scope of a guardianship, and appointment of a conservator terminates all or part of the power of attorney that relates to matters within the scope of the conservatorship.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This article gives deference to the principal’s choice of agent by providing that the agent’s authority continues, notwithstanding the later court appointment of a fiduciary, unless the court acts to limit or terminate the agent’s authority. This approach assumes that the later‑appointed fiduciary’s authority should supplement, not truncate, the agent’s authority. If, however, a fiduciary appointment is required because of the agent’s inadequate performance or breach of fiduciary duties or for other reasons such as family discord, the court, having considered this evidence during the appointment proceedings, may limit or terminate the agent’s authority contemporaneously with appointment of the fiduciary. Section 62‑8‑108(b) is consistent with the Uniform Health‑Care Decisions Act Section 6(a) (1993), which provides that a guardian may not revoke the ward’s advance health‑care directive unless the court appointing the guardian expressly so authorizes. Furthermore, it is consistent with the Uniform Guardianship and Protective Proceedings Act (1997), which provides that a guardian or conservator may not revoke the ward’s or protected person’s power of attorney for health‑care or financial management without first obtaining express authority of the court. See Unif. Guardianship & Protective Proc. Act Section 316(c) (guardianship), Section 411(d) (protective proceedings).

Deference for the principal’s autonomous choice is evident both in the presumption that an agent’s authority continues unless limited or terminated by the court, and in the directive that the court shall appoint a fiduciary in accordance with the principal’s most recent nomination (see subsection (a)). Typically, a principal will nominate as conservator or guardian the same individual named as agent under the power of attorney. Favoring the principal’s choice of agent and nominee, an approach consistent with most statutory hierarchies for guardian selection (see Unif. Guardianship & Protective Proc. Act Section 310(a)(2) (1997)), also discourages guardianship petitions filed for the sole purpose of thwarting the agent’s authority to gain control over a vulnerable principal. See Unif. Guardianship & Protective Proc. Act Section 310 cmt. (1997). See also Linda S. Ershow‑Levenberg, When Guardianship Actions Violate the Constitutionally‑Protected Right of Privacy, NAELA News, Apr. 2005, at 1 (arguing that appointment of a guardian when there is a valid power of attorney in place violates the alleged incapacitated person’s constitutionally protected rights of privacy and association). See also In re Thames, 344 S.C. 564, 544 S.E. 2d 854 (Ct. App. 2001).

**SECTION 62‑8‑109.** When power of attorney effective.

 (a) Except as provided in subsection (c), a power of attorney is effective when executed pursuant to Sections 62‑8‑105 and 62‑8‑106 unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.

 (1) If a power of attorney becomes effective upon the occurrence of a future event or contingency, the principal, in the power of attorney, may authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.

 (2) If a power of attorney becomes effective upon the principal’s incapacity and the principal has not authorized a person to determine whether the principal is incapacitated, or the person authorized is unable or unwilling to make the determination, the power of attorney becomes effective upon a determination in a writing or other record by:

 (A) a physician or licensed psychologist that the principal is incapacitated within the meaning of Section 62‑8‑102(5)(A); or

 (B) attorney at law, court of competent jurisdiction, or an appropriate governmental official that the principal is incapacitated within the meaning of Section 62‑8‑102(5)(B).

 (b) A person authorized by the principal in the power of attorney to determine that the principal is incapacitated may act as the principal’s personal representative pursuant to the Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, as amended, and applicable regulations, to obtain access to the principal’s health care information and communicate with the principal’s health care provider.

 (c) After the principal’s incapacity, an agent may exercise the authority granted unto the agent under the power of attorney only if the power of attorney has been recorded in the same manner as a deed in the county where the principal resides at the time the instrument is recorded. If the principal resides out of State, the power of attorney may be recorded in any county where property of the principal is located at the time the instrument is recorded. The power of attorney may be recorded before or after the principal’s incapacity. After the principal’s incapacity and before recordation, the agent’s authority cannot be exercised.

 (d) An agent may exercise a power of attorney executed in another jurisdiction if its execution complies with Section 62‑8‑106 if, after the principal’s incapacity, it is recorded as required in subsection (c). Notwithstanding the provisions of Section 30‑5‑30, a valid power of attorney as provided for pursuant to this part, which is executed in another jurisdiction, may be recorded as though it complies with the provisions of Section 30‑5‑30.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section establishes a default rule that a power of attorney is effective when executed. If the principal chooses to create what is commonly known as a “springing” or contingent power of attorney‑one that becomes effective at a future date or upon a future event or contingency‑the principal may authorize the agent or someone else to provide written verification that the event or contingency has occurred. Because the person authorized to verify the principal’s incapacitation will likely need access to the principal’s health information, subsection (b) qualifies that person to act as the principal’s “personal representative” for purposes of the Health Insurance Portability and Accountability Act (HIPAA). See 45 C.F.R. Section 164.502(g)(1)‑(2) (2006) (providing that for purposes of disclosing an individual’s protected health information, “a covered entity must treat a personal representative as the individual”). Section 62‑8‑109(b) does not, however, empower the agent to make health‑care decisions for the principal.

The default rule reflects a “best practices” philosophy that any agent who can be trusted to act for the principal under a springing power of attorney should be trustworthy enough to hold an immediate power. Survey evidence suggests, however, that a significant number of principals still prefer springing powers, most likely to maintain privacy in the hope that they will never need a surrogate decision maker. See Linda S. Whitton, National Durable Power of Attorney Survey Results and Analysis, National Conference of Commissioners on Uniform State Laws, 5‑7 (2002), http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm (reporting that 23% of lawyer respondents found their clients preferred springing powers, 61% reported a preference for immediate powers, and 16% saw no trend; however, 89% stated that a power of attorney statute should authorize springing powers).

If the principal’s incapacity is the trigger for a springing power of attorney and the principal has not authorized anyone to make that determination, or the authorized person is unable or unwilling to make the determination, this section provides a default mechanism to trigger the power. Incapacity based on the principal’s impairment may be verified by a physician or licensed psychologist, and incapacity based on the principal’s unavailability (i.e., the principal is missing, detained, or unable to return to the United States) may be verified by an attorney at law, judge, or an appropriate governmental official. Examples of appropriate governmental officials who may be in a position to determine that the principal is incapacitated within the meaning of Section 62‑8‑109(a)(1)(B) include an officer acting under authority of the United States Department of State or uniformed services of the United States or a sworn federal or state law enforcement officer. The default mechanism for triggering a power of attorney is available only when no incapacity determination has been made in accordance with the terms of the power of attorney. It is not available to challenge the determination made by the principal’s authorized designee.

CROSS REFERENCES

Acceptance of and reliance upon acknowledged power of attorney, form, see Section 62‑8‑119.

Termination of power of attorney or agent’s authority, see Section 62‑8‑110.

**SECTION 62‑8‑110.** Termination of power of attorney or agent’s authority.

 (a) A power of attorney terminates when the:

 (1) principal dies;

 (2) principal becomes incapacitated, if the power of attorney is not durable;

 (3) principal revokes the power of attorney;

 (4) power of attorney provides that it terminates;

 (5) purpose of the power of attorney is accomplished; or

 (6) principal revokes the agent’s authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

 (b) An agent’s authority terminates when the:

 (1) principal revokes the authority;

 (2) agent dies, becomes incapacitated, or resigns;

 (3) agent’s authority is revoked pursuant to Section 62‑2‑507, unless the power of attorney otherwise provides; or

 (4) power of attorney terminates.

 (c) Unless the power of attorney otherwise provides and subject to Section 62‑8‑109, an agent’s authority is exercisable until the agent’s authority terminates under subsection (b), notwithstanding a lapse of time since the execution of the power of attorney.

 (d) Termination of an agent’s authority or of a power of attorney is not effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal’s successors in interest.

 (e) Incapacity of the principal of a power of attorney that is not durable does not revoke or terminate the power of attorney as to an agent or other person that, without actual knowledge of the incapacity, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal’s successors in interest.

 (f) The execution of a power of attorney does not revoke a power of attorney previously executed by the principal unless the subsequent power of attorney provides that the previous power of attorney is revoked or that all other powers of attorney are revoked.

 (g) Unless otherwise provided in the power of attorney, a revocation of a power of attorney must be executed in accordance with Sections 62‑8‑105 and 62‑8‑106 and, if the power of attorney has been recorded, then the revocation also must be recorded in the same county as the recorded power of attorney.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section addresses termination of a power of attorney or an agent’s authority under a power of attorney. It first lists termination events (see subsections (a) and (b)), and then lists circumstances that, in contrast, either do not invalidate the power of attorney (see subsections (c) and (f)) or the actions taken pursuant to the power of attorney (see subsections (d) and (e)).

Subsection (c) provides that a power of attorney under the Act does not become “stale.” Unless a power of attorney provides for termination upon a certain date or after the passage of a period of time, lapse of time since execution is irrelevant to validity, a concept carried over from the Uniform Durable Power of Attorney Act. See Unif. Durable Power of Atty. Act Section 1 (as amended in 1987). Similarly, subsection (f) clarifies that a subsequently executed power of attorney will not revoke a prior power of attorney by virtue of inconsistency alone. To effect a revocation of a previously executed power of attorney, a subsequently executed power of attorney must expressly revoke a previously executed power of attorney or state that all other powers of attorney are revoked. The requirement of express revocation prevents inadvertent revocation when the principal intends for one agent to have limited authority that overlaps with broader authority held by another agent. For example, the principal who has given one agent a very broad power of attorney, including general authority with respect to real property, may later wish to give another agent limited authority to execute closing documents with respect to out‑of‑town real estate.

Subsections (d) and (e) emphasize that even a termination event is not effective as to the agent or person who, without actual knowledge of the termination event, acts in good faith under the power of attorney. For example, the principal’s death terminates a power of attorney (see subsection (a)(1)), but an agent who acts in good faith under a power of attorney without actual knowledge of the principal’s death will bind the principal’s successors in interest with that action (see subsection (d)). The same result is true if the agent knows of the principal’s death, but the person who accepts the agent’s apparent authority has no actual knowledge of the principal’s death. See Restatement (Third) of Agency Section 3.11 (2006) (stating that “termination of actual authority does not by itself end any apparent authority held by an agent”). See also Section 62‑8‑119(b) (stating that “[a] person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is . . . terminated . . . may rely upon the power of attorney as if the power of attorney were . . . still in effect . . .”). These concepts are also carried forward from the Uniform Durable Power of Attorney Act. See Unif. Durable Power Atty. Act Section 4 (1987).

Of special note in the list of termination events is subsection (b)(3) which provides that, unless the power of attorney provides otherwise, a spouse‑agent’s authority is revoked pursuant to Section 62‑2‑507, the so‑called revocation‑by‑divorce statute.

NOTES OF DECISIONS

In general 1

Review 2

1. In general

A “power of attorney” is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal; the written authorization itself is the power of attorney. Watson v. Underwood (S.C.App. 2014) 407 S.C. 443, 756 S.E.2d 155. Principal and Agent 10(1)

An action to interpret a power of attorney is similar to an action to interpret a contract. Watson v. Underwood (S.C.App. 2014) 407 S.C. 443, 756 S.E.2d 155. Principal and Agent 51

A “durable power of attorney” allows a person, the principal, to designate another as his or her attorney‑in‑fact to act on the principal’s behalf as provided in the document even if the principal becomes mentally incompetent. Watson v. Underwood (S.C.App. 2014) 407 S.C. 443, 756 S.E.2d 155. Principal and Agent 10(1)

Creation of irrevocable trust by putative settlor’s daughter, to whom settlor had granted a durable power of attorney, did not amount to the execution of a will in violation of the powers of a power of attorney; power of attorney specifically granted daughter power to create both revocable and irrevocable trusts, and fact that trust used settlor’s will to specify how to distribute assets held by trust in no way impeded settlor’s right to change her will. Watson v. Underwood (S.C.App. 2014) 407 S.C. 443, 756 S.E.2d 155. Principal and Agent 51; Trusts 8

Durable power of attorney naming daughter as mother’s power of attorney took effect when mother executed document, although mother later asserted that it was only to take effect if her health failed, where power of attorney did not provide that it only took effect if mother’s health failed, and it described how mental incapacity should not affect the power of attorney. Watson v. Underwood (S.C.App. 2014) 407 S.C. 443, 756 S.E.2d 155. Principal and Agent 10(1)

Sufficient evidence established that elderly woman, who had executed durable power of attorney in favor of family friend 11 years earlier, was incompetent to revoke that power of attorney and execute a new power of attorney in favor of relatives; several neurologists testified that woman suffered from dementia caused by Alzheimer’s disease, that the dementia began several years before she purportedly revoked the original power of attorney and executed the new one, that her condition was chronic and progressive, and that she did not have lucid moments, and testimony of lay witnesses corroborated the medical evidence. Gaddy v. Douglass (S.C.App. 2004) 359 S.C. 329, 597 S.E.2d 12. Principal And Agent 42

A son could not bring a divorce action on behalf of his father as his attorney‑in‑fact where he had subsequently been appointed conservator and guardian of his father’s estate, thus terminating his appointment as attorney‑in‑fact; in the absence of proof that the power of attorney was made durable despite the appointment of a conservator, the court would assume that no special provision was made. Murray by Murray v. Murray (S.C. 1993) 310 S.C. 336, 426 S.E.2d 781, 32 A.L.R.5th 883.

2. Review

Trial court’s order denying settlor’s petition to terminate irrevocable trust created by daughter pursuant to settlor’s power of attorney was not appealable, in settlor’s action challenging validity and funding of trust, where the matters at issue in the denial of the petition were intertwined with those to be determined at trial. Watson v. Underwood (S.C.App. 2014) 407 S.C. 443, 756 S.E.2d 155. Appeal and Error 70(.5)

**SECTION 62‑8‑111.** Coagents and successor agents.

 (a) A principal may designate two or more persons to act as coagents. Unless the power of attorney otherwise provides, each coagent may exercise its authority independently.

 (b) A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function. Unless the power of attorney otherwise provides, a successor agent:

 (1) has the same authority as that granted to the original agent; and

 (2) may not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.

 (c) Except as otherwise provided in the power of attorney and subsection (d), an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent.

 (d) An agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal’s best interest. An agent that fails to notify the principal or take action as required by this subsection is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section provides several default rules that merit careful consideration by the principal. Subsection (a) states that if a principal names coagents, each coagent may exercise its authority independently unless otherwise directed in the power of attorney. The Act adopts this default position to discourage the practice of executing separate, co‑extensive powers of attorney in favor of different agents, and to facilitate transactions with persons who are reluctant to accept a power of attorney from only one of two or more named agents. This default rule should not, however, be interpreted as encouraging the practice of naming coagents. For a principal who can still monitor the activities of an agent, naming coagents multiplies monitoring responsibilities and significantly increases the risk that inconsistent actions will be taken with the principal’s property. For the incapacitated principal, the risk is even greater that coagents will use the power of attorney to vie for control of the principal and the principal’s property. Although the principal can override the default rule by requiring coagents to act by majority or unanimous consensus, such a requirement impedes use of the power of attorney, especially among agents who do not share close physical or philosophical proximity. A more prudent practice is generally to name one original agent and one or more successor agents. If desirable, a principal may give the original agent authority to delegate the agent’s authority during periods when the agent is temporarily unavailable to serve (see Section 62‑8‑201(a)(5)).

Subsection (b) states that unless a power of attorney otherwise provides, a successor agent has the same authority as that granted to the original agent. While this default provision ensures that the scope of authority granted to the original agent can be carried forward by successors, a principal may want to consider whether a successor agent is an appropriate person to exercise all of the authority given to the original agent. For example, authority to make gifts, to create, amend, or revoke an inter vivos trust, or to create or change survivorship and beneficiary designations (see Section 62‑8‑201(a)) may be appropriate for a spouse‑agent, but not for an adult child who is named as the successor agent.

Subsection (c) provides a default rule that an agent is not liable for the actions of another agent unless the agent participates in or conceals the breach of fiduciary duty committed by that other agent. Consequently, absent specification to the contrary in the power of attorney, an agent has no duty to monitor another agent’s conduct. However, subsection (d) does require that an agent that has actual knowledge of a breach or imminent breach of fiduciary duty must notify the principal, and if the principal is incapacitated, take reasonably appropriate action to safeguard the principal’s best interest. Subsection (d) provides that if an agent fails to notify the principal or to take action to safeguard the principal’s best interest, that agent is liable only for the reasonably foreseeable damages that could have been avoided had the agent provided the required notification.

**SECTION 62‑8‑112.** Reimbursement and compensation of agent.

 Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section provides a default rule that an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to reasonable compensation. While it is unlikely that a principal would choose to alter the default rule as to expenses, a principal’s circumstances may warrant including limitations in the power of attorney as to the categories of expenses the agent may incur; likewise, the principal may choose to specify the terms of compensation rather than leave that determination to a reasonableness standard. Although many family‑member agents serve without compensation, payment of compensation to the agent may be advantageous to the principal in circumstances when the principal needs to spend down income or resources to meet qualifications for public benefits.

**SECTION 62‑8‑113.** Agent’s acceptance.

 Except as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by another assertion or conduct indicating acceptance.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section establishes a default rule for agent acceptance of appointment under a power of attorney. Unless a different method is provided in the power of attorney, an agent’s acceptance occurs upon exercise of authority, performance of duties, or any other assertion or conduct indicating acceptance. Acceptance is the critical reference point for commencement of the agency relationship and the imposition of fiduciary duties (see Section 62‑8‑114(a)). Because a person may be unaware that the principal has designated the person as an agent in a power of attorney, clear demarcation of when an agency relationship commences is necessary to protect both the principal and the agent. See Karen E. Boxx, The Durable Power of Attorney’s Place in the Family of Fiduciary Relationships, 36 Ga. L. Rev. 1, 41 (2001) (noting that “fiduciary duties should be imposed only to the extent the attorney‑in‑fact knows of the role, is able to accept responsibility, and affirmatively accepts”). The Act also provides a default method for agent resignation (see Section 62‑8‑118), which terminates the agency relationship (see Section 62‑8‑110(b)(2)).

**SECTION 62‑8‑114.** Agent’s duties.

 (a) An agent that has accepted appointment shall act:

 (1) in accordance with the principal’s reasonable expectations to the extent actually known by the agent and in the principal’s best interest;

 (2) in good faith; and

 (3) only within the scope of authority granted in the power of attorney.

 (b) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

 (1) act loyally for the principal’s benefit;

 (2) act so as not to create a conflict of interest that impairs the agent’s ability to act impartially in the principal’s best interest;

 (3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;

 (4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

 (5) cooperate with a person that has authority to make health care decisions for the principal to carry out the principal’s reasonable expectations to the extent actually known by the agent and act in the principal’s best interest; and

 (6) attempt to preserve the principal’s estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal’s best interest based on all relevant factors, including:

 (A) the value and nature of the principal’s property;

 (B) the principal’s foreseeable obligations and need for maintenance;

 (C) minimization of taxes, including income, estate, inheritance, generation‑skipping transfer, and gift taxes; and

 (D) eligibility for a benefit, a program, or assistance under a statute or regulation.

 (c) Except as provided in Section 62‑7‑602(A) an agent that acts in good faith is not liable to a beneficiary of the principal’s estate plan for failure to preserve the plan.

 (d) An agent that complies with subsection (a) is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.

 (e) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent’s representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

 (f) Absent a breach of duty to the principal, an agent is not liable if the value of the principal’s property declines.

 (g) An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.

 (h) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal’s estate. If so requested, within thirty days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional thirty days unless otherwise specified by the court.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section clarifies an agent’s duties by articulating minimum mandatory duties (subsection (a)) as well as default duties that can be modified or omitted by the principal (subsection (b)).

The mandatory duties‑acting in accordance with the principal’s reasonable expectations, if known, and otherwise in the principal’s best interest; acting in good faith; and acting only within the scope of authority granted‑may not be altered in the power of attorney. Establishing the principal’s reasonable expectations as the primary guideline for agent conduct is consistent with a policy preference for “substituted judgment” over “best interest” as the surrogate decision‑making standard that better protects an incapacitated person’s self‑determination interests. See Wingspan‑The Second National Guardianship Conference, Recommendations, 31 Stetson L. Rev. 595, 603 (2002). See also Unif. Guardianship & Protective Proc. Act Section 314(a) (1997).

This act does not require, nor does common practice dictate, that the principal state expectations or objectives in the power of attorney. In fact, one of the advantages of a power of attorney over a trust or guardianship is the flexibility and informality with which an agent may exercise authority and respond to changing circumstances. However, when a principal’s subjective expectations are potentially inconsistent with an objective best interest standard, good practice suggests memorializing those expectations in a written and admissible form as a precaution against later challenges to the agent’s conduct (see Section 62‑8‑116).

If a principal’s expectations potentially conflict with a default duty under this act, then stating the expectations in the power of attorney, or altering the default rule to accommodate the expectations, or both, is advisable. For example, a principal may want to invest in a business owned by a family member who is also the agent in order to improve the economic position of the agent and the agent’s family. Without the principal’s clear expression of this objective, investment by the agent of the principal’s property in the agent’s business may be viewed as breaching the default duty to act loyally for the principal’s benefit (subsection (b)(1)) or the default duty to avoid conflicts of interest that impair the agent’s ability to act impartially for the principal’s best interest (subsection (b)(2)).

Two default duties in this section protect the principal’s previously‑expressed choices. These are the duty to cooperate with the person authorized to make health‑care decisions for the principal (subsection (b)(5)) and the duty to preserve the principal’s estate plan (subsection (b)(6)). However, an agent has a duty to preserve the principal’s estate plan only to the extent the plan is actually known to the agent and only if preservation of the estate plan is consistent with the principal’s reasonable expectations and best interest. Factors relevant to determining whether preservation of the estate plan is in the principal’s best interest include the value of the principal’s property, the principal’s need for maintenance, minimization of taxes, and eligibility for public benefits. The act protects an agent from liability for failure to preserve the estate plan if the agent has acted in good faith (subsection (c)), subject to Section 62‑7‑602(A).

Subsection (d) provides that an agent acting with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has a conflict of interest. This position is a departure from the traditional common law duty of loyalty which required an agent to act solely for the benefit of the principal. See Restatement (Second) of Agency Section 387 (1958); see also Section 62‑7‑802(a) (requiring a trustee to administer a trust “solely in the interests” of the beneficiary). Subsection (d) is modeled after state statutes which provide that loyalty to the principal can be compatible with an incidental benefit to the agent. The Restatement (Third) of Agency Section 8.01 (2006) also contemplates that loyal service to the principal may be concurrently beneficial to the agent (see Reporter’s note a). See also John H. Langbein, Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?, 114 Yale L.J. 929, 943 (2005) (arguing that the sole interest test for loyalty should be replaced by the best interest test). The public policy which favors best interest over sole interest as the benchmark for agent loyalty comports with the practical reality that most agents under powers of attorney are family members who have inherent conflicts of interest with the principal arising from joint property ownership or inheritance expectations.

Subsection (e) provides additional protection for a principal who has selected an agent with special skills or expertise by requiring that such skills or expertise be considered when evaluating the agent’s conduct. If a principal chooses to appoint a family member or close friend to serve as an agent, but does not intend that agent to serve under a higher standard because of special skills or expertise, the principal should consider including an exoneration provision within the power of attorney (see comment to Section 62‑8‑115).

Subsections (f) and (g) state protections for an agent that are similar in scope to those applicable to a trustee. Subsection (f) holds an agent harmless for decline in the value of the principal’s property absent a breach of fiduciary duty (cf. Section 62‑7‑1003(b)). Subsection (g) holds an agent harmless for the conduct of a person to whom the agent has delegated authority, or who has been engaged by the agent on the principal’s behalf, provided the agent has exercised care, competence, and diligence in selecting and monitoring the person (cf. Section 62‑7‑807(c).

Subsection (h) codifies the agent’s common law duty to account to a principal (see Restatement (Third) of Agency Section 8.12 (2006); Restatement (First) of Agency Section 382 (1933)). Rather than create an affirmative duty of periodic accounting, subsection (h) states that the agent is not required to disclose receipts, disbursements or transactions unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. If the principal is deceased, the principal’s personal representative or successor in interest may request an agent to account. While there is no affirmative duty to account unless ordered by the court or requested by one of the foregoing persons, subsection (b)(4) does create a default duty to keep records.

The narrow categories of persons that may request an agent to account are consistent with the premise that a principal with capacity should control to whom the details of financial transactions are disclosed. If a principal becomes incapacitated or dies, then the principal’s fiduciary or personal representative may succeed to that monitoring function. The inclusion of a governmental agency (such as Adult Protective Services) in the list of persons that may request an agent to account is patterned after state legislative trends and is a response to growing national concern about financial abuse of vulnerable persons. See generally Donna J. Rabiner, David Brown & Janet O’Keeffe, Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them, 16 J. Elder Abuse & Neglect 65 (2004). As an additional protective counter‑measure to the narrow categories of persons who may request an agent to account, the Act contains a broad standing provision for seeking judicial review of an agent’s conduct. See Section 62‑8‑116 and Reporter’s Comment.

**SECTION 62‑8‑115.** Exoneration of agent.

 A provision in a power of attorney relieving an agent of liability for breach of duty is binding on the principal and the principal’s successors in interest except to the extent the provision:

 (1) relieves the agent of liability for breach of duty committed:

 (A) dishonestly;

 (B) in bad faith;

 (C) with reckless indifference to the purposes of the power of attorney;

 (D) through wilful misconduct;

 (E) through gross negligence; or

 (F) with actual fraud; or

 (2) was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section permits a principal to exonerate an agent from liability for breach of fiduciary duty, but prohibits exoneration for a breach committed dishonestly, willfully, with gross negligence, with reckless indifference or actual fraud or through a provision inserted through undue influence. The mandatory minimum standard of conduct required of an agent is equivalent to the good faith standard applicable to trustees. A trustee’s failure to adhere to that standard cannot be excused by language in the trust instrument. See Section 62‑7‑1008 cmt. (2003) (noting that “a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries”). See also Section 62‑8‑102(4) (defining good faith for purposes of the Act as “honesty in fact”). Section 62‑8‑115 provides, as an additional measure of protection for the principal, that an exoneration provision is not binding if it was inserted as the result of abuse of a confidential or fiduciary relationship with the principal. While as a matter of good practice an exoneration provision should be the exception rather than the rule, its inclusion in a power of attorney may be useful in meeting particular objectives of the principal. For example, if the principal is concerned that contentious family members will attack the agent’s conduct in order to gain control of the principal’s assets, an exoneration provision may deter such action or minimize the likelihood of success on the merits.

**SECTION 62‑8‑116.** Judicial relief.

 (a) The following persons may petition a court to construe a power of attorney or review the agent’s conduct, and grant appropriate relief:

 (1) the principal or the agent;

 (2) a guardian, conservator, or other fiduciary acting for the principal;

 (3) a person authorized to make health care decisions for the principal;

 (4) the principal’s spouse, parent, or adult descendant;

 (5) an individual who would qualify as a presumptive heir of the principal;

 (6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal’s death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal’s estate;

 (7) a governmental agency having regulatory authority to protect the welfare of the principal;

 (8) the principal’s caregiver or another person that demonstrates sufficient interest in the principal’s welfare; and

 (9) a person asked to accept the power of attorney.

 (b) Upon motion by the principal, the court shall dismiss a petition filed pursuant to this section if the court determines that dismissal is in the best interest of the principal.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

The primary purpose of this section is to protect vulnerable or incapacitated principals against financial abuse. Subsection (a) sets forth broad categories of persons who have standing to petition the court for construction of the power of attorney or review of the agent’s conduct, including in the list a “person that demonstrates sufficient interest in the principal’s welfare” (subsection (a)(8)).

In addition to providing a means for detecting and redressing financial abuse by agents, this section protects the self‑determination rights of principals. Subsection (b) states that the court must dismiss a petition upon the principal’s motion if the court finds that dismissal is in the best interest of the principal. Contrasted with the breadth of Section 62‑8‑116 is Section 62‑8‑114(h) which narrowly limits the persons who can request an agent to account for transactions conducted on the principal’s behalf. The rationale for narrowly restricting who may request an agent to account is the preservation of the principal’s financial privacy. See Section 62‑8‑114, Reporter’s Comment. Section 62‑8‑116 operates as a check‑and‑balance on the narrow scope of Section 62‑8‑114(h) and provides what, in many circumstances, may be the only means to detect and stop agent abuse of an incapacitated principal.

**SECTION 62‑8‑117.** Agent’s liability.

 An agent that violates this article is liable to the principal or the principal’s successors in interest for the amount required to:

 (1) restore the value of the principal’s property to what it would have been had the violation not occurred; and

 (2) reimburse the principal or the principal’s successors in interest for the attorney’s fees and costs paid on the agent’s behalf.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section provides that an agent’s liability for violating the Act includes not only the amount necessary to restore the principal’s property to what it would have been had the violation not occurred, but also any amounts for attorney’s fees and costs advanced from the principal’s property on the agent’s behalf. This section does not, however, limit the agent’s liability exposure to these amounts. Pursuant to Section 62‑8‑123, remedies under the Act are not exclusive. If a jurisdiction has enacted separate statutes to deal with financial abuse, an agent may face additional civil or criminal liability. For a discussion of state statutory responses to financial abuse, see Carolyn L. Dessin, Financial Abuse of the Elderly: Is the Solution a Problem?, 34 McGeorge L. Rev. 267 (2003).

**SECTION 62‑8‑118.** Agent’s resignation; notice.

 (a) Unless the power of attorney provides a different method for an agent’s resignation, an agent may resign by giving written notice to:

 (1) the principal;

 (2) a coagent or successor agent;

 (3) the principal’s conservator if one has been appointed for the principal; and

 (4) the principal’s guardian if one has been appointed for the principal.

 (b) If there is no person described in subsection (a)(1) through (4), then the agent shall provide written notice to:

 (1) the principal’s health care agent, if there is a health care agent; or

 (2) another person reasonably believed by the agent to have sufficient interest in the principal’s welfare, if there is no health care agent.

 (c) If the power of attorney has been recorded then the resignation also must be recorded in the same location as the recorded power of attorney.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section provides a default procedure for an agent’s resignation. An agent who no longer wishes to serve should formally resign to establish a clear demarcation of the end of the agent’s authority and to minimize gaps in fiduciary responsibility before a successor accepts the office. This section requires that the agent give notice to the principal and to the successor agent and, if a court has appointed a conservator or guardian, to the court appointed fiduciary. Subsection (2)(b) requires the resigning agent to give notice to the principal’s caregiver or to a person reasonably believed to have sufficient interest in the principal’s welfare which could include a governmental agency having authority to protect the welfare of the principal if there is no one available to give notice to under subsection (1). The choice among these options listed in paragraph (2)(b) is intentionally left to the agent’s discretion and is governed by the same standards as apply to other agent conduct. See Section 62‑8‑114(a) (requiring the agent to act in accordance with the principal’s reasonable expectations, if known, and otherwise in the principal’s best interest). Subsection (3) requires that, if the power of attorney has been recorded, the resignation must also be recorded.

**SECTION 62‑8‑119.** Acceptance of and reliance upon acknowledged power of attorney; form.

 (a) For purposes of this section and Section 62‑8‑120, “acknowledged” means purportedly executed pursuant to Section 62‑8‑105.

 (b) A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent’s authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent’s authority may rely upon the power of attorney as if the power of attorney were genuine, valid and still in effect, the agent’s authority were genuine, valid and still in effect, and the agent had not exceeded and had properly exercised the authority.

 (c) A person that is asked to accept an acknowledged power of attorney may request, and rely upon, without further investigation an:

 (1) agent’s certification under penalty of perjury of a factual matter concerning the principal, agent, or power of attorney; and

 (2) English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English; and

 (3) opinion of counsel as to a matter of law concerning the power of attorney if the power of attorney does not appear to be effective pursuant to Section 62‑8‑109. Such a request must provide a reason and be in writing.

 (d) An English translation or an opinion of counsel requested pursuant to this section must be provided at the principal’s expense unless the request is made more than seven business days after the power of attorney is presented for acceptance.

 (e) For purposes of this section and Section 62‑8‑120, a person that conducts activities through employees is without actual knowledge of a fact relating to a power of attorney, a principal, or an agent if the employee conducting the transaction involving the power of attorney is without actual knowledge of the fact.

 (f) The following optional form may be used by an agent to certify facts concerning a power of attorney:

AGENT’S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT’S AUTHORITY

State of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[County] of\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

I, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (Name of Agent), [certify] under penalty of perjury that \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_(Name of Principal) granted me authority as an agent or successor agent in a power of attorney dated \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

I further [certify] that to my knowledge:

 (1) the Principal is alive and has not revoked the Power of Attorney or my authority to act under the Power of Attorney and the Power of Attorney and my authority to act under the Power of Attorney have not terminated;

 (2) the action I desire to take is within the scope of my authority granted under the Power of Attorney.

 (3) if the Power of Attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;

 (4) if I was named as a successor agent, the prior agent is no longer able or willing to serve; and

 (5) \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(Insert Other Relevant Statements)

SIGNATURE AND ACKNOWLEDGMENT

|  |  |
| --- | --- |
|  |  |
|   |
| Agent’s Signature | Date |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Agent’s Name Printed

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Agent’s Address

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Agent’s Telephone Number

This document was acknowledged before me on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_,

(Date)

by\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

(Name of Agent)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_(Seal, if any)

Signature of Notary \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

My commission expires: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[This document prepared by:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section protects persons who in good faith accept a power of attorney which on its face complies with the execution requirements of Section 62‑8‑105. The purpose of this section is to protect a third person that in good faith accepts a power of attorney which appears on its face to be valid when the third person accepting the power of attorney is without knowledge that it contains a forged signature or a latent defect in the execution. The Act places the risk that a power of attorney is invalid upon the principal and the agent rather than the person that accepts the power of attorney. This approach promotes acceptance of powers of attorney, which is essential to their effectiveness as an alternative to guardianship. The national survey conducted by the Joint Editorial Board for Uniform Trust and Estate Acts (see Prefatory Note) found that a majority of respondents had difficulty obtaining acceptance of powers of attorney. Sixty‑three percent reported occasional difficulty and seventeen percent reported frequent difficulty. Linda S. Whitton, National Durable Power of Attorney Survey Results and Analysis, National Conference of Commissioners on Uniform State Laws 12‑13 (2002), available at http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm.

This section permits a person to rely in good faith on the validity of the power of attorney, the validity of the agent’s authority, and the propriety of the agent’s exercise of authority, unless the person has actual knowledge to the contrary (subsection (b)). Although a person is not required to investigate whether a power of attorney is valid or the agent’s exercise of authority proper, subsection (c) permits a person to request an agent’s certification of any factual matter (see Subsection (f) for a sample certification form) and an opinion of counsel when there is concern that the power of attorney may not be effective in accordance with Section 6‑8‑109. If the power of attorney contains, in whole or part, language other than English, an English translation may also be requested. Further protection is provided in subsection (e) for persons that conduct activities through employees. Subsection (e) states that, for purposes of Sections 62‑8‑119 and 62‑8‑120, a person is without actual knowledge of a fact if the employee conducting the transaction is without actual knowledge of the fact.

CROSS REFERENCES

Liability for refusal to accept acknowledged power of attorney, see Section 62‑8‑120.

**SECTION 62‑8‑120.** Liability for refusal to accept acknowledged power of attorney.

 (a) Except as otherwise provided in subsection (b):

 (1) a person shall either accept an acknowledged power of attorney as defined in Section 62‑8‑119 or request a certification, a translation, or an opinion of counsel as defined in Section 62‑8‑119(c) no later than seven business days after presentation of the power of attorney for acceptance;

 (2) if a person requests a certification, a translation, or an opinion of counsel pursuant to Section 62‑8‑119, the person shall accept the power of attorney no later than five business days after receipt of the certification, translation, or opinion of counsel; and

 (3) a person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented.

 (b) A person is not required to accept an acknowledged power of attorney if:

 (1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;

 (2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;

 (3) the person has actual knowledge of the termination of the agent’s authority or of the power of attorney before exercise of the power;

 (4) a request for a certification, a translation, or an opinion of counsel pursuant to Section 62‑8‑119(d) is refused;

 (5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel pursuant to Section 62‑8‑119 has been requested or provided;

 (6) the person makes, or has actual knowledge that another person has made, a report to the appropriate state agency stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent; or

 (7) the power does not contain the following provision or substantially the following provision:

 “No person who may act in reliance upon the representation of my agent for the scope of authority granted to the agent shall incur any liability to me or to my estate as a result of permitting the agent to exercise this authority, nor is any person who deals with my agent responsible to determine or ensure the proper application of funds or property.”.

 (c) A person that refuses in violation of this section to accept an acknowledged power of attorney is subject to:

 (1) a court order mandating acceptance of the power of attorney; and

 (2) liability for reasonable attorney’s fees and costs incurred in an action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

As a complement to Section 62‑8‑119, this section enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the act. Like Section 62‑8‑119, this section does not apply to powers of attorney that are not properly executed. Subsection (b) provides the bases upon which an acknowledged power of attorney may be refused without liability. Subsection (b)(6) permits refusal of an otherwise apparently valid power of attorney that does not meet any of the other bases for refusal if the person in good faith believes that the principal is subject to abuse by the agent or someone acting in concert with the agent. A refusal under this subsection is protected if the person makes, or knows another person has made, a report to the governmental agency authorized to protect the welfare of the principal. Subsection (b)(7) allows a person to refuse to accept an acknowledged power of attorney unless it contains the same or similar exculpatory language set forth in that subsection.

Unless a basis exists in subsection (b) for refusing an acknowledged power of attorney, subsection (a) requires that, within seven business days after the power of attorney is presented, a person must either accept the power of attorney or request a certification, a translation, or an opinion of counsel pursuant to Section 62‑8‑119. If a request under Section 62‑8‑119 is made, the person must decide to accept or reject the power of attorney no later than five business days after receipt of the requested document (subsection (a)(2)). Provided no basis exists for refusing the power of attorney, subsection (a)(3) prohibits a person from requesting an additional or different form of power of attorney for authority granted in the power of attorney presented.

Subsection (c) provides that a person that refuses an acknowledged power of attorney in violation of this section is subject to a court order mandating acceptance and to reasonable attorney’s fees and costs incurred in the action to confirm the validity of the power of attorney or to mandate acceptance.

CROSS REFERENCES

Acceptance of and reliance upon acknowledged power of attorney, form, see Section 62‑8‑119.

**SECTION 62‑8‑121.** Principles of law and equity.

 Unless displaced by a provision of this article, the principles of law and equity supplement this article.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

The Uniform Act is supplemented by common law, including the common law of agency, where provisions of the Act do not displace relevant common law principles. The common law of agency is articulated in the Restatement of Agency and includes contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. The common law also includes the traditional and broad equitable jurisdiction of the court, which this Act in no way restricts.

The statutory text of the South Carolina Uniform Power of Attorney Act is also supplemented by these comments, which, like the comments to any Uniform Act, may be relied on as a guide for interpretation. See Acierno v. Worthy Bros. Pipeline Corp., 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); Yale University v. Blumenthal, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2B Norman Singer, Southerland Statutory Construction Section 52.5 (6th ed. 2000).

**SECTION 62‑8‑122.** Laws applicable to financial institutions and entities.

 This part does not supersede another law applicable to financial institutions or other entities, and the other law controls if inconsistent with this part.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section addresses concerns of representatives from the banking and insurance industries that there may be regulations that govern those entities that conflict with provisions of this act. Although no specific conflicts were identified during the drafting process, this section provides that in the event a law applicable to a financial institution or other entity is inconsistent with this act, the other law will supersede this act to the extent of the inconsistency. This concern about inconsistency with the requirements of other law is already substantially addressed in Section 62‑8‑120, which provides, in pertinent part, that a person is not required to accept a power of attorney if, “the person is not otherwise required to engage in a transaction with the principal in the same circumstances,” or “engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law.”

**SECTION 62‑8‑123.** Remedies under other law.

 The remedies under this article are not exclusive and do not abrogate any right or remedy under the law of this State other than this article.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

The remedies under the Act are not intended to be exclusive with respect to causes of action that may accrue in relation to a power of attorney. The Act applies to many persons, individual and entity (see Section 62‑8‑102(6) (defining “person” for purposes of the Act)), that may serve as agents or that may be asked to accept a power of attorney. Likewise, the Act applies to many subject areas (see the following Sections) over which principals may delegate authority to agents. Remedies under other laws which govern such persons and subject matters should be considered by aggrieved parties in addition to remedies available under this Act. See, e.g., Section 62‑8‑117 Reporter’s Comment.

Part 2

Authority

Reporter’s General Comment

Part 2 of the act provides the default statutory construction for authority granted in a power of attorney. Sections 62‑8‑204 through 62‑8‑217 describe authority with respect to various subject matters. These descriptions may be incorporated by specific reference in the power of attorney to the sections which the principal desires to incorporate. Incorporation is accomplished by providing a citation to the section in which the authority is described (Section 62‑8‑202). A principal may also modify any authority incorporated by reference (Section 62‑8‑202(c)). Section 62‑8‑203 supplements Sections 62‑8‑204 through 62‑8‑217 by providing general terms of construction that apply to all grants of authority under those sections unless otherwise indicated in the power of attorney.

Part 2 includes a section that provides a default rule for the parameters of gift making authority (Section 62‑8‑217) and identifies specific acts that may be authorized only by an express grant in the power of attorney (Section 62‑8‑201(a)). Express authorization for the acts listed in Section 62‑8‑201(a) is required because of the risk those acts pose to the principal’s property and estate plan. The purpose of Section 62‑8‑201(a) is to make clear that authority for these acts may not be inferred from a grant of general authority.

Code Commissioner’s Note

Part title added at the direction of the Code Commissioner, in 2016.

**SECTION 62‑8‑201.** Authority that requires specific grant; grant of general authority.

 (a) Notwithstanding anything contained in Sections 62‑8‑204 through 62‑8‑217, an agent under a power of attorney may do the following on behalf of the principal or with the principal’s property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

 (1) create, amend, revoke, or terminate a trust, pursuant to Section 62‑7‑602A;

 (2) make a gift;

 (3) create or change rights of survivorship;

 (4) create or change a beneficiary designation;

 (5) delegate authority granted under the power of attorney;

 (6) waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;

 (7) exercise fiduciary powers that the principal has authority to delegate;

 (8) disclaim property, including a power of appointment;

 (9) access a safe deposit box or vault leased by the principal;

 (10) exercise a power of appointment in favor of someone other than the principal;

 (11) reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust, or other beneficial interest; or

 (12) deal with commodity futures contracts and call or put options on stocks or stock indexes.

 (b) Notwithstanding a grant of authority to do an act described in subsection (a), unless the power of attorney otherwise provides, only an agent who is an ancestor, spouse, or descendant of the principal, may exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal’s property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

 (c) Except as to those acts enumerated in subsection (a) and subject to subsections (b), (d), and (e), if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in Sections 62‑8‑204 through 62‑8‑216.

 (d) Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to Section 62‑8‑217.

 (e) Except as to those acts enumerated in subsection (a) and subject to subsections (b) and (d), if the acts over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

 (f) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this State and whether or not the authority is exercised or the power of attorney is executed in this State.

 (g) An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal’s successors in interest as if the principal had performed the act.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section distinguishes between grants of specific authority that require express language in a power of attorney and grants of general authority that do not require express language. Subsection (a) enumerates the acts that require an express grant of specific authority and which may not be inferred from a grant of general authority. This approach follows South Carolina case law. See, e.g, Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985). The rationale for requiring a grant of specific authority to perform the acts enumerated in subsection (a) is the risk those acts pose to the principal’s property and estate plan. Although risky, such authority may nevertheless be necessary or advisable to effectuate the principal’s property management and estate planning objectives, including tax considerations, special needs, and government benefits. Ideally, these are matters about which the principal will seek advice before granting authority to an agent and about which the agent would seek advice before exercising the authority granted to the agent.

As with any authority incorporated by reference in a power of attorney, the principal may enlarge or restrict the default parameters set by the Act.

With respect to other acts listed in subsection (a), this Act contemplates that the principal will specify any special instructions in the power of attorney to further define or limit the authority granted. For example, if a principal grants authority to create or change rights of survivorship (subsection (a)(3)) or beneficiary designations (subsection (a)(4)), the principal may choose to restrict that authority to specifically identified property interests, accounts, or contracts or to specific persons, such as the principal’s spouse or descendants. Principals should carefully consider not only whether to authorize any of the acts listed in subsection (a), but also whether to limit the scope of such actions.

Subsection (b) contains an additional safeguard for the principal. It establishes as a default rule that an agent who is not an ancestor, spouse, or descendant of the principal may not exercise authority to create, in the agent or in an individual the agent is legally obligated to support, an interest in the principal’s property. For example, a non‑relative agent with gift making authority could not make a gift to the agent or a dependent of the agent without the principal’s express authority in the power of attorney. In contrast, a spouse‑agent with express gift‑making authority could implement the principal’s expectation that annual family gifts be continued without additional authority in the power of attorney.

Notwithstanding a grant of authority to perform any of the enumerated acts in subsection (a), an agent is bound by the mandatory fiduciary duties set forth in Section 62‑8‑114(a) as well as the default duties that the principal has not modified If the principal’s expectations for the performance of authorized acts potentially conflict with those duties, then clarification of the principal’s expectations, modification of the default duties, or both, may be advisable. See Section 62‑8‑114 Reporter’s Comment.

Authority for acts and subject matters other than those listed in Section 62‑8‑201(a) may be granted either through incorporation by reference (see Section 62‑8‑202) or, if the principal wishes to grant comprehensive general authority, by a grant of authority to do all the acts that a principal could do. A broad grant of general authority is interpreted under the Act as including all of the subject matters and authority described in Sections 62‑8‑204 through 62‑8‑216 (see subsection (c)).

**SECTION 62‑8‑202.** Incorporation of authority.

 (a) An agent has authority described in this part if the power of attorney cites the section in which the authority is described.

 (b) A reference in a power of attorney citing one or more of Sections 62‑8‑204 through 62‑8‑217 incorporates the entire section as if it were set out in full in the power of attorney.

 (c) The power of attorney may modify authority incorporated by reference or may grant authority to an agent as provided in the power of attorney.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section provides that a reference to the section number or numbers incorporates the entire statutory section referenced as if it were set out in full in the power of attorney. Subsection (c) provides that a principal may modify any authority incorporated by reference and may grant different or additional authority than that provided by specifying the authority so granted in the power of attorney. The intent of the Act is to allow a principal to grant authority to an agent by reference to specific sections of the Act, which are then incorporated into the document, but not to limit other powers that the principal may grant to an agent, such as the powers described in Section 62‑8‑201.

**SECTION 62‑8‑203.** Construction of authority generally.

 Except as otherwise provided in the power of attorney, by executing a power of attorney that incorporates by reference one or more of Sections 62‑8‑204 through 62‑8‑217, a principal also authorizes the agent, with respect to that subject, to:

 (1) demand, receive, and obtain by litigation or otherwise, money or another thing of value to which the principal is, may become, or claims to be entitled, and conserve, invest, disburse, or use anything so received or obtained for the purposes intended;

 (2) contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction and perform, rescind, cancel, terminate, reform, restate, release, or modify the contract or another contract made by or on behalf of the principal;

 (3) execute, acknowledge, seal, deliver, file, or record an instrument or communication the agent considers desirable to accomplish a purpose of a transaction, including creating at any time a schedule listing some or all of the principal’s property and attaching it to the power of attorney;

 (4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to a claim existing in favor of or against the principal or intervene in litigation relating to the claim;

 (5) seek on the principal’s behalf the assistance of a court or other governmental agency to carry out an act authorized in the power of attorney;

 (6) engage, compensate, and discharge an attorney, accountant, discretionary investment manager, expert witness, or other advisor, even though they are associated with the agent to advise or assist the agent in the performance of the agent’s administrative duties and to act upon their recommendation without independent investigation and, instead of acting personally, to employ one or more agents to perform an act of administration, whether or not discretionary;

 (7) prepare, execute, and file a record, report, or other document to safeguard or promote the principal’s interest under a statute or regulation;

 (8) communicate with a representative or employee of a government or governmental subdivision, agency, or instrumentality, on behalf of the principal;

 (9) access communications intended for, and communicate on behalf of the principal, whether by mail, electronic transmission, telephone, or other means, access the principal’s files electronically, and obtain the principal’s user names and passwords; and

 (10) do any lawful act with respect to the subject and all property related to the subject.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section describes incidental types of authority that accompany all authority granted to an agent under each of Sections 62‑8‑204 through 62‑8‑217, unless this incidental authority is modified in the power of attorney. The actions authorized in this section are of the type often necessary for the exercise or implementation of authority over the subjects described in Sections 62‑8‑204 through 62‑8‑217, Paragraph (10), which states that an agent is authorized to “do any lawful act with respect to the subject and all property related to the subject,” emphasizes that a grant of general authority is intended to be comprehensive unless otherwise limited by the Act or the power of attorney. Paragraphs (8) and (9) clarify that this comprehensive authority includes authorization to communicate with government employees on behalf of the principal, to access communications intended for the principal, and to communicate on behalf of the principal using all modern means of communication. Paragraph (6 allows flexibility in the choice of the listed professionals and advisors. Paragraph 9 ensures that the agent is allowed to obtain the principal’s user names and passwords.

**SECTION 62‑8‑204.** Real property.

 Unless the power of attorney otherwise provides and subject to Section 62‑8‑201, language in a power of attorney granting general authority with respect to real property authorizes the agent to:

 (1) demand, buy, lease, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject an interest in real property or a right incident to real property;

 (2) sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; retain title for security; encumber; partition; consent to partitioning; subject to an easement or covenant; subdivide; apply for zoning or other governmental permits; plat or consent to platting; develop; grant an option concerning; lease; sublease; contribute to an entity in exchange for an interest in that entity; or otherwise grant or dispose of an interest in real property or a right incident to real property;

 (3) pledge or mortgage an interest in real property or right incident to real property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

 (4) release, assign, satisfy, or enforce by litigation or otherwise a mortgage, deed of trust, conditional sale contract, encumbrance, lien, or other claim to real property which exists or is asserted;

 (5) manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal, including:

 (A) insuring against liability or casualty or other loss;

 (B) obtaining or regaining possession of or protecting the interest or right by litigation or otherwise;

 (C) paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with them; and

 (D) purchasing supplies, hiring assistance or labor, and making repairs or alterations to the real property;

 (6) use, develop, alter, replace, remove, erect, or install structures or other improvements upon real property in or incident to which the principal has, or claims to have, an interest or right;

 (7) participate in a reorganization with respect to real property or an entity that owns an interest in or right incident to real property and receive, and hold, and act with respect to stocks and bonds or other property received in a plan of reorganization, including:

 (A) selling or otherwise disposing of them;

 (B) exercising or selling an option, right of conversion, or similar right with respect to them; and

 (C) exercising any voting rights in person or by proxy;

 (8) change the form of title of an interest in or right incident to real property; and

 (9) dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

If a power of attorney specifically cites this section, the agent will have the powers listed in this section unless otherwise modified or limited by the power of attorney.

**SECTION 62‑8‑205.** Tangible personal property.

 Unless the power of attorney otherwise provides and subject to Section 62‑8‑201, language in a power of attorney granting general authority with respect to tangible personal property authorizes the agent to:

 (1) demand, buy, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject ownership or possession of tangible personal property or an interest in tangible personal property;

 (2) sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; create a security interest in; grant options concerning; lease; sublease; or, otherwise dispose of tangible personal property or an interest in tangible personal property;

 (3) grant a security interest in tangible personal property or an interest in tangible personal property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

 (4) release, assign, satisfy, or enforce by litigation or otherwise, a security interest, lien, or other claim on behalf of the principal, with respect to tangible personal property or an interest in tangible personal property;

 (5) manage or conserve tangible personal property or an interest in tangible personal property on behalf of the principal, including:

 (A) insuring against liability or casualty or other loss;

 (B) obtaining or regaining possession of or protecting the property or interest, by litigation or otherwise;

 (C) paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments;

 (D) moving the property from place to place;

 (E) storing the property for hire or on a gratuitous bailment; and

 (F) using and making repairs, alterations, or improvements to the property;

 (6) change the form of title of an interest in tangible personal property; and

 (7) take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

If a power of attorney specifically cites this section, then the agent will have the powers listed in this section unless otherwise modified or limited by the power of attorney. Paragraph (7), found in Section 214 of the Uniform Power of Attorney Act, has been added to the South Carolina version of this section to place it with the other powers related to tangible personal property.

**SECTION 62‑8‑206.** Stocks and bonds.

 Unless the power of attorney otherwise provides and subject to Section 62‑8‑201, language in a power of attorney granting general authority with respect to stocks and bonds, authorizes the agent to:

 (1) buy, sell, and exchange stocks and bonds;

 (2) establish, continue, modify, or terminate an account with respect to stocks and bonds;

 (3) pledge stocks and bonds as security to borrow, pay, renew, or extend the time of payment of a debt of the principal;

 (4) receive certificates and other evidences of ownership with respect to stocks and bonds; and

 (5) exercise voting rights with respect to stocks and bonds in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

If a power of attorney specifically cites this section, the agent will have the powers listed in this section unless otherwise modified or limited by the power of attorney. “Stocks and bonds” is a defined term in the Act. See Section 62‑8‑102(13).

**SECTION 62‑8‑207.** Commodities and options.

 Unless the power of attorney otherwise provides and subject to Section 62‑8‑201, language in a power of attorney granting general authority with respect to commodities and options authorizes the agent to:

 (1) buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call or put options on stocks or stock indexes traded on a regulated option exchange; and

 (2) establish, continue, modify, and terminate option accounts.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

If a power of attorney specifically cites this section, the agent will have the powers listed in this section unless otherwise modified or limited by the power of attorney.

**SECTION 62‑8‑208.** Banks and other financial institutions.

 Unless the power of attorney otherwise provides and subject to Section 62‑8‑201, language in a power of attorney granting general authority with respect to banks and other financial institutions authorizes the agent to:

 (1) continue, modify, and terminate an account or other banking arrangement made by or on behalf of the principal;

 (2) establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the agent;

 (3) contract for services available from a financial institution, including renting a safe deposit box or space in a vault;

 (4) withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;

 (5) receive statements of account, vouchers, notices, and similar documents from a financial institution and act with respect to them;

 (6) borrow money and pledge as security personal property of the principal necessary to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

 (7) make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of the principal or payable to the principal or the principal’s order, transfer money, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person upon the principal and pay it when due;

 (8) receive for the principal and act upon a sight draft, warehouse receipt, or other document of title whether tangible or electronic, or other negotiable or nonnegotiable instrument;

 (9) apply for, receive, and use letters of credit, credit and debit cards, electronic transaction authorizations, and traveler’s checks from a financial institution and give an indemnity or other agreement in connection with letters of credit; and

 (10) consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

If a power of attorney specifically cites this section, the agent will have the powers listed in this section unless otherwise modified or limited by the power of attorney. The power of attorney may also modify the powers in accordance with Section 62‑8‑201. The section differs from the Uniform Power of Attorney Act in that paragraph (6) relating to safety deposit boxes has been deleted because those powers are found in Sections 34‑19‑10, et seq.

**SECTION 62‑8‑209.** Operation of entity or business.

 Subject to Section 62‑8‑201 and the terms of a document or an agreement governing an entity or an entity ownership interest, and unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to operation of an entity or business authorizes the agent to:

 (1) operate, buy, sell, enlarge, reduce, or terminate an ownership interest;

 (2) perform a duty or discharge a liability and exercise in person or by proxy a right, power, privilege, or option that the principal has, may have, or claims to have;

 (3) enforce the terms of an ownership agreement;

 (4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party because of an ownership interest;

 (5) exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds;

 (6) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party concerning stocks and bonds;

 (7) with respect to an entity or business owned solely by the principal:

 (A) continue, modify, renegotiate, extend, and terminate a contract made by or on behalf of the principal with respect to the entity or business before execution of the power of attorney;

 (B) determine the:

 (i) location of its operation;

 (ii) nature and extent of its business;

 (iii) methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation;

 (iv) amount and types of insurance carried; and

 (v) mode of engaging, compensating, and dealing with its employees and accountants, attorneys, or other advisors;

 (C) change the name or form of organization under which the entity or business is operated and enter into an ownership agreement with other persons to take over all or part of the operation of the entity or business; and

 (D) demand and receive money due or claimed by the principal or on the principal’s behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business;

 (8) put additional capital into an entity or business in which the principal has an interest;

 (9) join in a plan of reorganization, consolidation, conversion, domestication, or merger of the entity or business;

 (10) sell or liquidate all or part of an entity or business;

 (11) establish the value of an entity or business under a buy‑out agreement to which the principal is a party;

 (12) prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to an entity or business and make related payments; and

 (13) pay, compromise, or contest taxes, assessments, fines, or penalties and perform another act to protect the principal from illegal or unnecessary taxation, assessments, fines, or penalties, with respect to an entity or business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

If a power of attorney specifically cites this section, the agent will have the powers listed in this section unless otherwise modified or limited by the power of attorney. This section encompasses all modern business and entity forms, including limited liability companies, limited liability partnerships, and entities that may be organized other than for a business purpose.

**SECTION 62‑8‑210.** Insurance and annuities.

 Unless the power of attorney otherwise provides and subject to Section 62‑8‑201, language in a power of attorney granting general authority with respect to insurance and annuities authorizes the agent to:

 (1) continue, pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract procured by or on behalf of the principal which insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract;

 (2) procure new, different, and additional contracts of insurance and annuities for the principal and the principal’s spouse, children, and other dependents, and select the amount, type of insurance or annuity, and mode of payment;

 (3) pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract of insurance or annuity procured by the agent;

 (4) apply for and receive a loan secured by a contract of insurance or annuity;

 (5) surrender and receive the cash surrender value on a contract of insurance or annuity;

 (6) exercise an election;

 (7) exercise investment powers available under a contract of insurance or annuity;

 (8) change the manner of paying premiums on a contract of insurance or annuity;

 (9) change or convert the type of insurance or annuity with respect to which the principal has or claims to have authority described in this section;

 (10) apply for and procure a benefit or assistance under a statute or regulation to guarantee or pay premiums of a contract of insurance on the life of the principal;

 (11) collect, sell, assign, hypothecate, borrow against, or pledge the interest of the principal in a contract of insurance or annuity;

 (12) select the form and timing of the payment of proceeds from a contract of insurance or annuity; and

 (13) pay, from proceeds or otherwise, compromise or contest, and apply for refunds in connection with, a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

If a power of attorney specifically cites this section, the agent will have the powers listed in this section unless otherwise modified or limited by the power of attorney. Under Section 62‑8‑201(a)(4), an agent does not have authority to “create or change a beneficiary designation” unless that authority is specifically granted to the agent pursuant to Section 62‑8‑201(a). The authority granted under Paragraph (2) of Section 62‑8‑210 is more limited, allowing an agent to only “procure new, different, and additional contracts of insurance and annuities for the principal and the principal’s spouse, children, and other dependents.” A principal who grants authority to an agent under Section 62‑8‑210 should therefore carefully consider whether a specific grant of authority to create or change beneficiary designations is also desirable.

**SECTION 62‑8‑211.** Estates, trusts, and other beneficial interests.

 (a) In this section, “estate, trust, or other beneficial interest” means a trust, probate estate, guardianship, conservatorship, escrow, or custodianship or a fund from which the principal is, may become, or claims to be, entitled to a share or payment.

 (b) Unless the power of attorney otherwise provides and subject to Section 62‑8‑201, language in a power of attorney granting general authority with respect to estates, trusts, and other beneficial interests authorizes the agent to:

 (1) accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from an estate, trust, or other beneficial interest;

 (2) demand or obtain money or another thing of value to which the principal is, may become, or claims to be, entitled by reason of an estate, trust, or other beneficial interest, by litigation or otherwise;

 (3) exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal;

 (4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal;

 (5) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to remove, substitute, or surcharge a fiduciary;

 (6) conserve, invest, disburse, or use anything received for an authorized purpose; and

 (7) transfer an interest of the principal in real property, stocks and bonds, accounts with financial institutions or securities intermediaries, insurance, annuities, and other property to the trustee of a revocable trust created by the principal as settlor.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

If a power of attorney specifically cites this section, the agent will have the powers listed in this section unless otherwise modified or limited by the power of attorney. This section clarifies that an agent’s authority includes authority to exercise, for the benefit of the principal, a presently exercisable general power of appointment held by the principal (subsection (b)(3)). “Presently exercisable general power of appointment” is defined for purposes of the Act in Section 62‑8‑102(8).

**SECTION 62‑8‑212.** Claims and Litigation.

 Unless the power of attorney otherwise provides and subject to Section 62‑8‑201, language in a power of attorney granting general authority with respect to claims and litigation authorizes the agent to:

 (1) assert and maintain before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, recoupment, or defense, including an action to recover property or other thing of value, recover damages sustained by the principal, eliminate or modify tax liability, or seek an injunction, specific performance, or other relief;

 (2) bring an action to determine adverse claims or intervene or otherwise participate in litigation;

 (3) seek an attachment, garnishment, order of arrest, or other preliminary, provisional, or intermediate relief and use an available procedure to effect or satisfy a judgment, order, or decree;

 (4) make or accept a tender, offer of judgment, or admission of facts, submit a controversy on an agreed statement of facts, consent to examination, and bind the principal in litigation;

 (5) submit to alternative dispute resolution, settle, and propose or accept a compromise;

 (6) waive the issuance and service of process upon the principal, accept service of process, appear for the principal, designate persons upon whom process directed to the principal may be served, execute and file or deliver stipulations on the principal’s behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive, execute, and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation;

 (7) act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee which affects an interest of the principal in property or other thing of value;

 (8) pay a judgment, award, or order against the principal or a settlement made in connection with a claim or litigation; and

 (9) receive money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

If a power of attorney specifically cites this section, the agent will have the powers listed in this section unless otherwise modified or limited by the power of attorney.

**SECTION 62‑8‑213.** Personal and Family Maintenance.

 (a) Unless the power of attorney otherwise provides and subject to Section 62‑8‑201, language in a power of attorney granting general authority with respect to personal and family maintenance authorizes the agent to:

 (1) perform the acts necessary to maintain the customary standard of living of the principal, the principal’s spouse, and the following individuals, whether living when the power of attorney is executed or later born:

 (A) individuals legally entitled to be supported by the principal; and

 (B) the individuals whom the principal has customarily supported or indicated the intent to support;

 (2) make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the principal is a party;

 (3) provide living quarters for the individuals described in subsection (a)(1) by:

 (A) purchase, lease, or other contract; or

 (B) paying the operating costs, including interest, amortization payments, repairs, improvements, and taxes, for premises owned by the principal or occupied by those individuals;

 (4) provide normal domestic help, usual vacations and travel expenses, and funds for shelter, clothing, food, appropriate education, including postsecondary and vocational education, and other current living costs for the individuals described in item (1);

 (5) pay expenses for necessary health care and custodial care on behalf of the individuals described in subsection (a)(1);

 (6) act as the principal’s personal representative pursuant to the Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, as amended, and applicable regulations, in making decisions related to the past, present, or future payment for the provision of health care consented to by the principal or anyone authorized under the law of this State to consent to health care on behalf of the principal;

 (7) continue a provision made by the principal for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them, for the individuals described in subsection (a)(1);

 (8) maintain credit and debit accounts for the convenience of the individuals described in subsection (a)(1) and open new accounts;

 (9) continue payments incidental to the membership or affiliation of the principal in a religious institution, club, society, order, or other organization or to continue contributions to those organizations; and

 (10) enter into financial arrangements and agreements for the admission and care of the principal with an assisted living facility, nursing home, hospital, rehabilitative or respite facility, in home or other care providers, including hiring and firing home health care and other providers of services to the principal.

 (b) Authority with respect to personal and family maintenance is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts pursuant to this article.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

If a power of attorney specifically cites this section, the agent will have the powers listed in this section unless otherwise modified or limited by the power of attorney. Subsection (a)(1) specifies who qualifies to benefit from payments for personal and family maintenance.

Subsection (a)(6) qualifies the agent to act as the principal’s “personal representative” for purposes of the Health Insurance Portability and Accountability Act (HIPAA) so that the agent can communicate with health care providers to pay medical bills. See 45 C.F.R. Section 164.502(g)(1)‑(2) (2006) (providing that for purposes of disclosing an individual’s protected health information, “a covered entity must . . . treat a personal representative as the individual”). Subsection (a)(6) does not, however, empower the agent to make health‑care decisions for the principal. See Section 62‑8‑103 Reporter’s Comment (discussing that decision‑making for financial management and health care are often interdependent and referring to the rule in Section 62‑8‑114(b)(5) for an agent under this Act to cooperate with the principal’s health‑care decision‑maker).

Subsection (b) provides that authority under this section is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to making gifts. Although payments made for the benefit of persons under this section may in fact be subject to gift tax treatment, subsection (b) clarifies that the authority for personal and family maintenance payments by an agent emanates from this section rather than Section 62‑8‑217. This is an important distinction because the Act requires a grant of specific authority under Section 62‑8‑201(a) to authorize gift making, and the default provisions of Section 62‑8‑217 limit the amounts and methods of those gifts. The authority to make payments under this section is not constrained by either of these provisions.

The South Carolina Act adds Subsection (a)10, which clarifies the powers an agent has with regard to arranging for the principal’s health care.

**SECTION 62‑8‑214.** Benefits from governmental programs or civil or military service.

 (a) In this section, “benefits from governmental programs or civil or military service” means a benefit, program, or assistance provided under a statute or regulation including Social Security, Medicare, and Medicaid.

 (b) Unless the power of attorney otherwise provides and subject to Section 62‑8‑201, language in a power of attorney granting general authority with respect to benefits from governmental programs or civil or military service authorizes the agent to:

 (1) execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described in Section 62‑8‑213(a)(1), and for shipment of their household effects;

 (2) enroll in, apply for, select, reject, change, amend, or discontinue, on the principal’s behalf, a benefit or program;

 (3) prepare, file, and maintain a claim of the principal for a benefit or assistance, financial or otherwise, to which the principal may be entitled under a statute or regulation;

 (4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation concerning a benefit or assistance the principal may be entitled to receive under a statute or regulation; and

 (5) receive the financial proceeds of a claim described in item (4) and conserve, invest, disburse, or use for a lawful purpose anything so received.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

If a power of attorney specifically cites this section, the agent will have the powers listed in this section unless otherwise modified or limited by the power of attorney. While this section incorporates most of the Uniform Power of Attorney Act provisions, subsection (b)(2) of the uniform act, relating to removal and shipment of personal property, has been moved to Section 62‑8‑205, which lists powers relating to tangible personal property.

**SECTION 62‑8‑215.** Retirement plans.

 (a) In this section, “retirement plan” means a plan or account created by an employer, the principal, or another individual to provide retirement benefits or deferred compensation of which the principal is a participant, beneficiary, or owner, including a plan or account under the following sections of the Internal Revenue Code:

 (1) an individual retirement account under Internal Revenue Code 26 U.S.C. Section 408, as amended;

 (2) a Roth individual retirement account under Internal Revenue Code 26 U.S.C. Section 408A, as amended;

 (3) a deemed individual retirement account under Internal Revenue Code 26 U.S.C. Section 408(q), as amended;

 (4) an annuity or mutual fund custodial account under Internal Revenue Code 26 U.S.C. Section 403(b), as amended;

 (5) a pension, profit‑sharing, stock bonus, or other retirement plan qualified under Internal Revenue Code 26 U.S.C. Section 401(a), as amended;

 (6) a plan under Internal Revenue Code 26 U.S.C. Section 457(b), as amended; and

 (7) a nonqualified deferred compensation plan under Internal Revenue Code 26 U.S.C. Section 409A, as amended.

 (b) Unless the power of attorney otherwise provides and subject to Section 62‑8‑201, language in a power of attorney granting general authority with respect to retirement plans authorizes the agent to:

 (1) select the form and timing of payments under a retirement plan, including election of survivor benefits, and withdraw benefits from a plan;

 (2) make a rollover, including a direct trustee‑to‑trustee rollover, of benefits from one retirement plan to another;

 (3) establish a retirement plan in the principal’s name;

 (4) make contributions to a retirement plan;

 (5) exercise investment powers available under a retirement plan; and

 (6) borrow from, sell assets to, or purchase assets from a retirement plan.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

If a power of attorney specifically cites this section, the agent will have the powers listed in this section unless otherwise modified or limited by the power of attorney. Under this Act, the authority to waive the principal’s right to be a beneficiary of a joint and survivor annuity must be given by a specific grant pursuant to Section 62‑8‑201(a).

**SECTION 62‑8‑216.** Taxes.

 Unless the power of attorney otherwise provides and subject to Section 62‑8‑201, language in a power of attorney granting general authority with respect to taxes authorizes the agent to:

 (1) prepare, sign, and file federal, state, local, and foreign income, gift, payroll, property, Federal Insurance Contributions Act, and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and other tax‑related documents, including receipts, offers, waivers, consents, including consents and agreements pursuant to Internal Revenue Code 26 U.S.C. Section 2032A, as amended, closing agreements, and any power of attorney required by the Internal Revenue Service, including Form 2848 or other taxing authority with respect to a tax year upon which the statute of limitations has not run and the following twenty‑five tax years;

 (2) pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service or other taxing authority;

 (3) exercise any election available to the principal under federal, state, local, or foreign tax law; and

 (4) act for the principal in all tax matters for all periods before the Internal Revenue Service, or other taxing authority.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

If a power of attorney specifically cites this section, the agent will have the powers listed in this section unless otherwise modified or limited by the power of attorney.

**SECTION 62‑8‑217.** Gifts.

 (a) In this section, a gift “for the benefit of” a person includes a gift to a trust, an account under the Uniform Transfers to Minors Act, and a tuition savings account or prepaid tuition plan as defined in Internal Revenue Code 26 U.S.C. Section 529, as amended.

 (b) Unless the power of attorney otherwise provides and subject to Section 62‑8‑201, language in a power of attorney granting general authority with respect to gifts authorizes the agent to:

 (1) make outright to, or for the benefit of, a person, a gift of any of the principal’s property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion pursuant to Internal Revenue Code 26 U.S.C. Section 2503(b), as amended, without regard to whether the federal gift tax exclusion applies to the gift, or if the principal’s spouse agrees to consent to a split gift pursuant to Internal Revenue Code 26 U.S.C. 2513, as amended, in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and

 (2) consent, pursuant to Internal Revenue Code 26 U.S.C. Section 2513, as amended, to the splitting of a gift made by the principal’s spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.

 (3) An agent may make a gift of the principal’s property only as the agent determines is consistent with the principal’s objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal’s best interest based on:

 (A) the value and nature of the principal’s property;

 (B) the principal’s foreseeable obligations and need for maintenance;

 (C) minimization of taxes, including income, estate, inheritance, generation‑skipping transfer, and gift taxes;

 (D) eligibility for a benefit, a program, or assistance under a statute or regulation; and

 (E) the principal’s personal history of making or joining in making gifts.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

If a power of attorney specifically cites this section, the agent will have the powers listed in this section unless otherwise modified or limited by the power of attorney. This section provides default limitations on an agent’s authority to make a gift of the principal’s property. Authority to make a gift must be made by a specific grant in a power of attorney (see Section 62‑8‑201(a)(2). The mere granting to an agent of authority to make gifts does not, however, grant an agent unlimited authority. The agent’s authority is subject to this section unless enlarged or further limited by an express modification in the power of attorney. Without modification, the authority of an agent under this section is limited to gifts in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion, or twice that amount if the principal and the principal’s spouse consent to make a split gift.

Subsection (a) of this section clarifies the fact that a gift includes not only outright gifts, but also gifts for the benefit of a person. Subsection (a) provides examples of gifts made for the benefit of a person, but these examples are not intended to be exclusive.

Subsection (b)(3) emphasizes that exercise of authority to make a gift, as with exercise of all authority under a power of attorney, must be consistent with the principal’s objectives. If these objectives are not known, then gifts must be consistent with the principal’s best interest based on all relevant factors. Subsection (b)(3) provides examples of factors relevant to the principal’s best interest, but these examples are illustrative rather than exclusive.

To the extent that a principal’s objectives with respect to the making of gifts may potentially conflict with an agent’s default duties under the Act, the principal should carefully consider stating those objectives in the power of attorney, or altering the default rules to accommodate the objectives, or both. See Section 62‑8‑114 Reporter’s Comment.

CROSS REFERENCES

Authority that requires specific grant, grant of general authority, see Section 62‑8‑201.

Part 3

Reserved

Part 4

Miscellaneous Provisions

Code Commissioner’s Note

Part title added at the direction of the Code Commissioner, in 2016.

**SECTION 62‑8‑401.** Jurisdiction.

 The probate court has concurrent jurisdiction with the circuit courts of this State over all subject matter related to the creation, exercise, construction, and termination of powers of attorney governed by the provisions of this article.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Reporter’s Comment

This section incorporates most of former Section 62‑5‑503. It does not contain the provision for approval of the sale of real and personal property by an attorney‑in‑fact to avoid the possible misinterpretation under the former section that the deleted provision was a requirement for such a sale rather than a confirmation of jurisdiction. Although in some cases court approval of real or personal property is necessary or appropriate, it is not required in all cases.

**SECTION 62‑8‑402.** Relation to Electronic Signatures in Global and National Commerce Act.

 This article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

Federal Aspects

Electronic Signatures in Global and National Commerce Act (E‑Sign Act); Pub.L. 106‑229, June 30, 2000, 114 Stat. 464. Short title, see 15 U.S.C.A. Section 7001 note

**SECTION 62‑8‑403.** Effect on existing powers of attorney.

 Except as otherwise provided in this article on the effective date of this act:

 (a) this article applies to a power of attorney created on or after the effective date of this act;

 (b) the procedural provisions of this article apply to a judicial proceeding concerning a power of attorney commenced on or after the effective date of this act;

 (c) the applicable law in effect before the effective date of this act applies to a power of attorney created or restated before the effective date of this act;

 (d) the procedural provisions of this article apply to a judicial proceeding concerning a power of attorney commenced before the effective date of this act unless the court finds that application of a procedural provision of this act would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that procedural provision does not apply and the applicable procedural provision in effect at the commencement of the judicial proceeding applies; and

 (e) an act done before the effective date of this act is not affected by this act.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.